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In The

Supreme Court of the United States

October Term, 1996

EDGEWOOD BAPTIST CHURCH d/b/a NEW BEGINNINGS ADOPTION AND COUNSELING AGENCY, PHOEBE DAWSON, ANDY MERRITT, MARY ELLEN SLAUGHTER, JANE DOE, JANET DOE, AND JAMES DOE,

Petitioners,

v.

BLANE and KRISTI CESNIK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Should an adopting couple, which learned of their child's severe physical and mental disabilities after placement, but prior to the adoption, be entitled to future damages including all medical and extraordinary expenses from the adoption agency which placed the child in their home?

(2) Should the Eleventh Circuit have affirmed the district court's grant of summary judgment to Petitioners as to the Respondents' RICO claims where the evidence establishes that the Petitioners did not rely, to their detriment, on the alleged misrepresentations made by the Petitioners?

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PETITION FOR WRIT OF CERTIORARI

Edgewood Baptist Church d/b/a New Beginnings Adoption Agency, Phoebe Dawson and Andy Merritt respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on July 5, 1996, to resolve important and serious issues concerning the law of adoption.

CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 88 F.3d 902. It is reprinted in the Appendix hereto. (*See* beginning at App. 1).

By Order filed August 20, 1996, the Eleventh Circuit denied the Petition for Rehearing. (*See* App. 27).

The decision of the United States District Court in the Middle District of Georgia is an unreported decision. It is reprinted in the Appendix beginning at App. 23.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered on July 5, 1996. The Court of Appeals denied the Petition for Rehearing on August 20, 1996. This court has jurisdiction to issue the requested writ of certiorari pursuant to 28 U.S.C. § 1254(1) because the Petitioners seek review of an adverse decision rendered by the United States Court of

Appeals for the Eleventh Circuit. Pursuant to the Supreme Court Rule 13.1, this Petition has been filed within ninety days of the denial of the rehearing and is, therefore, timely filed.

STATUTES INVOLVED IN THE CASE

O.C.G.A. § 1964(c):

Any person injured in his business or property by reason of a violation of § 1962 of this Chapter may sue thereof in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorneys' fees.

O.C.G.A. § 16-14-4:

(a) It is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money.

(b) It is unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity.

(c) It is unlawful for any person to conspire or endeavor to violate any of the provisions of subsection (a) or (b) of this Code section.

STATEMENT OF CASE

A. FACTUAL BACKGROUND

On December 9, 1993, the Respondents, Blane and Kristi Cesnik (hereinafter the "Respondents") filed their Complaint in the United States District Court for the Middle District of Georgia. The Respondents' claim arises out of the adoption of two "special needs" children, meaning children with physical and/or mental disabilities, from Edgewood Baptist Church d/b/a New Beginnings Adoption and Counseling Agency (hereinafter "the Agency"). On December 9, 1989, the Agency placed the first child, Caleb, who was born on November 20, 1989, with Respondents pursuant to a placement agreement. The agreement provides in part that:

> We expressly understand and acknowledge that in receiving the child into our home the agency does not relinquish legal custody of the child, but, in fact, continues to have legal custody until the adoption is consummated by a final order of adoption by a court of competent jurisdiction. We assume all risks of taking the child into our custody and understand that the child shall continue to be considered and, in fact, in the legal custody of the agency until a final decree of adoption is taken.

Shortly after the Respondents received placement of Caleb, they became aware that Caleb had physical and mental disabilities. During the placement period, Caleb's doctors diagnosed him with having disabilities including cerebral palsy, asthma, developmental disorders and severe behavioral problems. Prior to the placement, Respondents had expressed a desire to adopt a healthy

child. At the time the Respondents learned of the disabilities, they were well aware that they had no legal obligation to provide ongoing care for Caleb and that they could return him to the Agency and forego the adoption. The Respondents were also cognizant of the fact that the expenses associated with raising Caleb would exceed the expenses associated with raising a healthy child. Notwithstanding these facts, the Respondents opted to go forward with the adoption of Caleb. Thereafter, they petitioned the Minnesota state court for the legal custody of Caleb. The adoption of Caleb occurred on July 10, 1990, about seven months after the initial placement.

Approximately seven months after the Respondents adopted Caleb, the Respondents contacted the Agency requesting to adopt a second child. Again, the Respondents expressed a desire to adopt a healthy child. On April 6, 1991, the Agency placed Eli, who was born February 12, 1991, with the Respondents. The Respondents signed a second placement agreement identical to the one they signed regarding Caleb's placement. Within a few days after the placement of Eli, the Respondents learned that Eli had physical and mental disabilities, including cerebral palsy. Again, the Respondents opted to continue with the placement of the child and eventually petitioned the court for legal custody of Eli. On September 26, 1991, the Minnesota court granted the Respondents' petition for the adoption of Eli.

It is undisputed that the Respondents were fully aware in both instances that they had the option of foregoing the adoption process and return the prospective adoptees to the Agency. The Respondents knew before the adoption of both children that assuming full financial

responsibility for them would cost above what it would cost to provide for a child without special needs. The Agency, which had legal custody of the children until the final adoption, could have ended the proceedings anytime prior to the final adoption. The Agency had another family ready to accept placement for at least one of the children. The Respondents made it clear, however, that they wanted to continue with the adoptions regardless of the future expenses. With full knowledge of the financial implications of adopting special needs children, the Respondents accepted legal custody of each child, including the financial responsibility to provide ongoing medical care for each child.

The Respondents claim, among other things, that the Agency breached its contract with them because the children they adopted are not healthy. There is, however, no written contract for the adoption of healthy children. Instead, the only agreements entered between the Respondents and the Agency are the respective placement agreements. The purpose of the placement period is to determine whether the adoption of the child, who remains in legal custody of the Agency until such adoption, is in the best interest of the child and the adopting couple. Obviously, all parties involved consented to the adoptions of Caleb and Eli.

The Agency filed a Motion for Summary Judgment as to each of the Respondents' claims. The Middle District of Georgia granted the Petitioners' Motion as to all issues. The Eleventh Circuit Court of Appeals affirmed, in part, and vacated in part. The Petitioners seek writ of certiorari as to the Eleventh Circuit Court of Appeal's Order vacating the grant of summary judgment as to the breach of

contract claim and the claims based on federal and state RICO statutes.

JURISDICTION

28 U.S.C. § 1331; 28 U.S.C. § 1332.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT COURT OF APPEALS' OPINION AS TO THE BREACH OF CONTRACT CLAIM WILL HAVE A SUBSTANTIAL CHILLING EFFECT ON AN ADOPTION AGENCY'S ABILITY TO PLACE CHILDREN FOR ADOPTION.

The Eleventh Circuit's decision allows parents who elect to adopt a child knowing that such child has physical and mental disabilities to recover damages from the Agency which placed the child in their hands. This law is unfair as it relates to the facts of this case and will have a substantial adverse effect on an adoption agencies' ability to remain in business. The adoption process is a multi phase process. After the adoption agency has matched an available child with a potential new home, there is a placement period. The purpose and goal of the placement period is for the parties involved to determine whether it is in the best interest of those involved that the adopting parents become the legal custodian of the child. The placement period gives the couple the opportunity to evaluate the child and provides the opportunity to decide in an intelligent manner whether to adopt. *Burr v. Board of*

Commissioners of Starke County, 230 Oh. St. 3d 69, 491 N.E.2d 1101 (1986).

If all parties involved determine that the adoption would be in the best interest of the child, the parties petition the court to have legal custody of the child transferred from the Agency to the parents. It is undisputed here that the Respondents initially expressed a preference to adopt healthy children. It is clearly in everyone's best interest to place newborn children as soon as possible. As in this case, complete physical and mental makeup of the child may not be known at the time of placement. The purpose of having a placement period is to make certain that all parties become fully aware and comfortable with their decision prior to the adoption. It is in dispute whether the Agency should have known of the children's problems before placement. However, it is undisputed that Respondents knew, before they adopted the children, that they were not healthy. Accordingly, the Respondents were not deprived of their opportunity to make an informed, sound decision about parenting. Any damages should be limited to the placement period before the Respondents learned of the disabilities and not extended past the time they elected to proceed with the adoption. This is not a case in which the adopting parents were misinformed about the health of the adoptive children, adopted the children and then learned of the childrens' physical and mental disabilities. Accepting the responsibility to provide medical care for their children was part of the adoption. However, the Respondents now want the Agency to finance their childrens' medical expenses. If the Eleventh Circuits' opinion is upheld, the Respondents, and any other adopting parents who learn

of problems after placement, can shift the lifetime burden of providing for their children to the Agency. This will obviously affect any adoption agency's ability to exist.

The Eleventh Circuit Court analogized the adoptions here to a seller misrepresenting the quality of goods sold to a buyer. The analogy, however, is severely flawed. Where a purchaser procures goods from a seller, the transaction is a one-step process. In the Eleventh Circuit Court's analogy, the buyer orders goods for a stated price and the seller delivers the goods. If the goods are not of the quality ordered, then the buyer can either rescind the transaction by returning the goods to the seller and demanding a return of the purchase price or he can stand on the transaction and sue for damages – measured by the difference in value between the goods as represented and the goods as received. *See* App. 19. The analogy is pure, and simply a misstatement of the facts of this case. Initially, it confuses the placement process with the adoption. If this analogy is to be used, the "sale" must be the final adoption.

For the Eleventh Circuit's analogy to be applicable, the Respondents would have had to discover the misrepresentation of the fitness of the children after the adoption as opposed to before. The Respondents concede that this is not the case. A more appropriate analogy here is where a purchaser buys goods in "as-is, where-is" condition. The Commercial Code of Georgia, O.C.G.A. § 11-2-316, deals with property sold in "as-is" condition. Subsection (b)(3) states that "when the buyer *before entering into the contract, has examined the goods or the sample or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to defects which an*

examination ought and the circumstances to have revealed to him."

For example, in *Harrison Gulley Chevrolet, Inc. v. Carr*, 134 Ga. App. 499, 214 S.E.2d 712 (1975), the plaintiff's decedent purchased an automobile from the defendant dealership. The plaintiff's decedent was involved in an accident and died. The plaintiff subsequently filed suit against the car dealership alleging that the proximate cause of the death of the decedent was the negligence of the car dealership for selling the car to the plaintiff's decedent with an improper sized steering wheel, over-sized tires and a faulty steering mechanism. In reversing the trial court's denial of the car dealership's motion for summary judgment, the court relied upon O.C.G.A. § 11-2-316 and held that the events of the purchase of the car established that the plaintiff's decedent had inspected the car, including the steering wheel and tires and test drove the vehicle prior to purchasing the vehicle. Accordingly, because they revealed the defects to the plaintiff's decedent during her inspection of the car, the plaintiff was not entitled to recover on a breach of implied warranty claim.

Here, the placement of Caleb and Eli with the Respondents before their receiving legal custody of the children is the equivalent of their opportunity to decide whether the children fit the requirements they requested from the Agency. In other words, the Respondents had an opportunity to "examine the goods." It was not until after the Respondents examined the goods that they decided to petition the court for the adoption of the children. During the examination of the children to be adopted, the Respondents discovered that the children were special

needs children and that they would be responsible for the medical care. When the Agency consented to the adoptions, it did so with the understanding and knowledge that the Respondents were adopting special needs children and that the Respondents, not the Agency, would be legally responsible for the childrens' ongoing medical expenses. Moreover, when the Respondents petitioned the court for the adoptions, they did so with the knowledge and understanding that they were adopting special needs children. The conduct of both parties established a mutual departure from the Plaintiffs' original request of healthy children. The Respondents made a conscious decision to accept the "goods" they received from the agency in "as-is" condition. The Respondents had their eyes wide open when they accepted the responsibility they now seek to shift back to the Agency. The Agency is aware of no authority that supports such a proposition, save the Eleventh Circuit Court's ruling here.

If the Eleventh Circuit's opinion stands, the Agency will be exposed to the possibility of paying millions of dollars in medical expenses to care for the Respondents children. Moreover, other adoption agencies would potentially be open to unending obligations to provide for children they place for possible adoption where the parents requested a healthy child and knowingly adopted an unhealthy child. In such a case, the adopting parents would be precluded from bringing a cause of action for fraud because the element of justifiable reliance would be absent. *See Richard P. v. Vista Delmar Child Care Service*, 106 Cal. App. 2d 860, 165 Cal. Rptr. 370 (1980) (where the parents, rather than rely upon the adoption agency's statements as to the child's health, consulted with their

own pediatrician. The court held that the plaintiffs' fraud claims were subject to dismissal because the requisite element of reliance was lacking). The Respondents' alleged damages do not flow from the alleged breach of contract; they voluntarily undertook the responsibility for the children with full knowledge of their disabilities.

O.C.G.A. § 13-6-2 provides that "damages recoverable for a breach of a contract are such as arise naturally and according to the usual course of things from such breach and such as the parties *or contemplated* when the contract was made, as the probable result of its breach." If there was a breach of an agreement here, the breach was of the Placement Agreement. To the extent the Agency breached the Placement Agreement by placing with the Respondents unhealthy children, the Agency would arguably be responsible for payment of extraordinary expenses during the placement period or until the special needs were discovered. However, at some point, there must be an end to the Agency's obligation. That end came when the Respondents chose to continue the placement and adopt the children. Thus, if the Agency somehow breached a contract for adoption, the Agency would be responsible for damages pursuant to O.C.G.A. § 13-6-2. Because the damages the Respondents seek to recover were not contemplated, the Eleventh Circuit Court's opinion is inconsistent with Georgia's statute regarding damages. To allow the Respondents to now seek payment of medical expenses and other extraordinary expenses that were to arise naturally from the raising of the children, not arising naturally from the breach of any contract, would be a windfall to them. Adoption agencies would be unable to operate if there was a risk

that a family could sue to recover expenses that all parties contemplated would naturally occur from the adoption.

This appears to be an issue of first impression. Accordingly, for the reasons stated above, certiorari is appropriate in this case to correct a law which will have far reaching effects in a growing and sensitive area of the law.

II. THE ELEVENTH CIRCUIT SHOULD HAVE AFFIRMED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT AS TO ALL FEDERAL AND STATE RICO CLAIMS BECAUSE THERE WAS NO PROXIMATE CAUSE BETWEEN ANY OF THE ALLEGED ACTS AND THE RESPONDENTS' ALLEGED INJURIES.

The Respondents' RICO claims must fail because there was no proximate cause between any alleged acts and the alleged damages. The Respondents claim in their Complaint that the Agency violated both federal and state RICO statutes by placing each child allegedly with knowledge of the mental and physical disabilities. Again, whether the Agency should have known of these disabilities is in dispute. Assuming that these allegations can be proven, however, there still can be no recovery under either RICO statute. 18 U.S.C. § 1964(c) and O.C.G.A. § 16-14-4 both provide civil remedies to those persons who are injured "by reason of" racketeering activity. In other words, a plaintiff in a RICO action must prove proximate cause in order to recover. *Holmes v. Securities Investor Protection Corps.*, 112 S.Ct. 1311, 1317-18, 117 L.Ed.2d 532 (1992); *see also Reverend Father O'Malley v. Reverend Father O'Neill*, 887 F.2d 1557, 1562 (11th Cir.

1989), " . . . causation principles generally applicable to tort liability must be considered applicable in RICO cases." As stated in *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994):

> When a private plaintiff relies on a violation of the mail or wire fraud statutes, as a predicate act for civil RICO, he faces an additional hurdle before he can obtain recovery: he must show not only that the mail or wire fraud statutes have been violated, but also that he has suffered injury as a result of the violation.

Pelletier v. Zweifel, 921 F.2d at 1499 (11th Cir. 1991). In other words, when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied, to his detriment, on misrepresentations made in furtherance of that scheme. *Id.* at 1500 (*citing Blount Fin. Servs. v. Walter E. Heller & Co.*, 819 F.2d 151, 152 (6th Cir. 1987)).

With regard to the future damages claimed by the Respondents, it was incumbent upon them to establish that the placement of the children by the Agency proximately caused the damages which occurred after the adoption. The evidence in the case conclusively establishes that the proximate cause of any future expenses incurred by the Respondents was their decision to proceed with the adoption after learning of the childrens' disabilities. The alleged fraud occurred when the Agency placed the children allegedly knowing that they had disabilities. Not only did the Respondents know prior to the adoptions that the children had these disabilities, they also knew that they could terminate the adoption procedure and return the children to the Agency. They were also aware, at least with regard to Eli, that there was

another family ready, willing and able to adopt him. Notwithstanding this information, they forged on with the adoption of each child. The Respondents went into the adoptions with their eyes wide open. They allegedly received inaccurate and incomplete information from the Agency at the time of the placement, but by the time they bound themselves to be legally responsible for the children, all of the information was on the table. Under these facts, the Respondents cannot now claim that their injury was proximately caused by the alleged fraudulent scheme or that they justifiably relied, to their detriment, on any alleged misrepresentations. *Pelletier v. Zweifel*, 921 F.2d 1465, 1498-99 (11th Cir. 1991). Absent any proximate cause between the alleged conduct and the resulting injuries, the Respondents cannot be allowed to recover for any damages after the date of their discovery of the disabilities.

CONCLUSION

The Petitioners respectfully request the Court to grant this Petition, issue a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit and vacate the Eleventh Circuit's decision regarding these issues.

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-8151

D. C. Docket No. 93-CV-141-COL

BLANE CESNIK, KRISTI CESNIK,

Plaintiffs-Appellants,

versus

EDGEWOOD BAPTIST CHURCH, d/b/a New Beginnings Adoption and Counseling Agency, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(Filed July 5, 1996)

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and FAY, Senior Circuit Judge.

TJOFLAT, Chief Judge:

This case arises out of the adoptions of two newborn babies. The adopting parents contend that the adoption agency deliberately misrepresented that the infants were healthy when, in fact, they were severely mentally and physically disabled. The adopting parents brought this

suit against the church that operates the adoption agency and against three individuals involved directly or indirectly in the adoptions. The parents' complaint presented multiple common-law and statutory (both state and federal) tort claims and a claim for breach of contract. On motion for summary judgment, the district court dismissed all of the parents' claims. This appeal followed.

With respect to the common-law tort claims, we are able to say with confidence that the district court was correct in relying on the statute of limitations to bar the claims. With respect to the remainder of the appellants' claims, however, all that we can say is that, with a few exceptions, the district court's granting of summary judgment cannot be sustained on this record. Our review of these claims is limited because the appellants have presented us with a "shotgun" complaint, which is so muddled that it is difficult to discern what the appellants are alleging beyond the mere names of certain causes of action.

We begin this opinion with a statement of the facts, which we glean from the depositions and affidavits that the parties presented to the district court in support of and in opposition to the appellees' joint motion for summary judgment. In drawing this statement of facts, we consider the evidence in the record in the light most favorable to the non-movants, the appellants. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). After setting out the facts, we examine the appellants' complaint, and the district court's reasons for disposing of appellants' claims. We then explain why summary judgment was appropriate on

some of appellants' claims and why some of their claims should not have been disposed of summarily.

I.

Blane and Kristi Cesnik, who live in St. Cloud, Minnesota, are the parents of four severely mentally and physically disabled children, all of whom they have adopted. They adopted their two youngest children, Caleb and Eli, through the New Beginnings Adoption and Counseling Agency, an unincorporated entity operated by the Edgewood Baptist Church, a corporation organized under Georgia law with its place of business in Columbus.[1]

In November of 1989, Kristi Cesnik called Phoebe Dawson, the director of New Beginnings, and told Dawson that she and her husband were seeking to adopt a healthy, non-disabled child of any sex and any race. On November 20, 1989, a baby boy, whom the Cesniks would name Caleb, was born at a hospital in Columbus. Dawson contacted the Cesniks by telephone and told them that she had obtained and reviewed the medical records of Caleb's delivery, including the results of tests that the Cesniks had asked to be performed. Dawson told them that all of the medical records and other information she had obtained indicated that the boy was perfectly healthy. Dawson also told the Cesniks that Caleb's birth mother had received prenatal care since the sixth week of

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[1] The Cesniks adopted two disabled girls prior to the adoptions that are the subject of this lawsuit. New Beginnings was not involved with those prior adoptions.

pregnancy and that she had not used drugs during the pregnancy.

Dawson delivered Caleb to the Cesniks on December 10, 1989, at an airport in Minnesota. The Cesniks soon noticed that Caleb had health problems. Four to six months after the placement, the Cesniks received Caleb's medical records.[2] The records showed that the birth mother had, in fact, received no prenatal care, that she had tested positive for opiates and barbiturates at the time of delivery, that the delivery had been complicated, and that Caleb had been born prematurely. The Cesniks' doctors soon diagnosed Caleb with cerebral palsy, asthma, developmental disorders, and severe behavioral problems. The doctors suspect that most or all of these conditions were caused by exposure to drugs and alcohol during the pregnancy and by a lack of prenatal care.

When the Cesniks asked Dawson about the discrepancy between the medical records and what she had told them, Dawson explained that she had not actually reviewed Caleb's medical records before he was placed with the Cesniks because the records had been switched at the New Beginnings agency with those of another mother with the same name. Dawson also claimed that Caleb's birth mother had lied about her condition and her use of drugs. The Cesniks accepted Dawson's explanations. The adoption of Caleb became final on July 10, 1990.

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[2] At the time of Caleb's placement, the Cesniks signed a form that stated that they had received Caleb's medical records. This statement was not true. Dawson had told the Cesniks that signing the form at that time would make it unnecessary for her to make another trip to Minnesota.

In December of 1990, the Cesniks contacted New Beginnings again, seeking to adopt a healthy, non-disabled, black or mixed-race child.[3] On February 12, 1991, a baby boy, whom the Cesniks would name Eli, was born at a hospital in Columbus. Dawson contacted the Cesniks by telephone and told them that she had obtained and reviewed the medical records of Eli's delivery, including the results of tests that the Cesniks had asked to be performed. Dawson told them that all of the medical records and other information she had obtained indicated that the boy was perfectly healthy. Dawson also told the Cesniks that Eli's birth mother had received prenatal care since the early stages of her pregnancy, and that Dawson knew the birth mother's personal history, including the fact that the birth mother had not used drugs during the pregnancy.

Dawson delivered Eli to the Cesniks on April 6, 1991, at an airport in Minnesota. The Cesniks soon noticed that Eli had health problems, and they contacted Dawson by telephone and requested his medical records.[4] The agency sent the medical records a week or two later. The records showed that Eli's birth mother had, in fact, received no prenatal care and that she had experienced severe pre-eclampsia and toxemia. Furthermore, no drug test had been performed on Eli at the time of birth, as had been requested by the Cesniks. A drug test performed on April

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[3] The Cesniks sought a black or mixed-race child in the interest of Caleb, who is black.

[4] Just as they did at the time of Caleb's placement, the Cesniks signed a form that stated that they had received Eli's medical records. Again, this statement was not true.

1 indicated the presence of codeine and morphine, although that may have been the result of medication that Eli was taking at the time. The records also showed that Eli had intrauterine growth retardation and low Apgar scores. The Cesniks' doctors soon diagnosed Eli with cerebral palsy, pseudobulbar palsy, asthma, stomach problems, fetal alcohol syndrome, facial deformities, colitis, a sleeping disorder, and behavior problems associated with autism. The doctors suspect, as they do with Caleb, that most or all of these conditions were caused by exposure to drugs and alcohol during the pregnancy and by a lack of prenatal care.

When the Cesniks asked Dawson about the discrepancy between the medical records and what she had told them, Dawson explained, as she did after Caleb's placement, that she had not actually reviewed Eli's medical records before he was placed with the Cesniks because the records had been switched at the New Beginnings agency with those of another mother with a similar name. Dawson also claimed that Eli's birth mother had lied about her condition and her use of drugs. This time, the Cesniks did not accept Dawson's explanations.

On July 21, 1991, shortly after the Cesniks began making inquiries about receiving an adoption assistance subsidy from the state of Georgia for the two boys,[5] Dawson met the Cesniks at their home in Minnesota.

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[5] The Georgia Department of Human Resources provides federally subsidized adoption assistance payments for children with "special needs," including mental and physical disabilities. *See* Social Security Act of 1935, 42 U.S.C. § 673 (1994).

Holding Eli in her arms, Dawson told the Cesniks that she could withhold her consent to the Cesniks' adoption of the boy if there was any further discussion of his medical condition or if the Cesniks did not keep quiet about what had happened. After this incident, the Cesniks had no further contact with Dawson. The adoption of Eli became final on September 26, 1991.

In August of 1992, the Cesniks made a formal complaint to the Georgia Department of Human Resources about the manner in which New Beginnings handled the placements of Caleb and Eli. The state agency investigated, found various deficiencies in New Beginnings' adoption procedures, and required the agency to take corrective action.

II.

On December 9, 1993, the Cesniks filed a complaint in the United States District Court for the Middle District of Georgia against the Edgewood Baptist Church, Andy Merritt (the associate pastor of Edgewood Baptist Church who had supervisory authority over New Beginnings), Phoebe Dawson (the executive director of New Beginnings), and Mary Ellen Slaughter Winton (the social case worker hired by New Beginnings to work with Eli's birth mother during her pregnancy). The complaint consists of three counts, which are preceded by ninety-nine numbered paragraphs of factual recitations that are incorporated by reference into each of the three counts. In addition, count two incorporates all of the allegations – including the causes of action – of count one, and count three, in

turn, incorporates all of the allegations – including the causes of action – of counts one and two.

The complaint is the sort of "shotgun" notice pleading we encountered in *Anderson v. District Bd. of Trustees*, 77 F.3d 364, 366-67 (11th Cir. 1996), and in scores of other cases – both reported and unreported – that have come before this court.[6] It was framed in complete disregard of the principle that separate, discrete causes of action should be plead in separate counts. *Anderson*, 77 F.3d at 366. Count one, for example, which is labeled "Wrongful Placement and Adoption," purports to plead at least nine discrete theories of recovery. After alleging that the Cesniks were induced by the appellees' misrepresentations to adopt Caleb and Eli, the count states the following:

> This count of the Complaint encompassed by the claim of "Wrongful Placement and Adoption" and sounding in tort law, includes but is not limited to the common law torts of negligent breach of duty; negligent hiring, training, supervision, discipline and retention of personnel; negligence per se; breach of fiduciary relationship; misrepresentation; fraud in the inducement and the act; undue influence; duress; and intentional infliction of emotional distress.

Nowhere in count one do the Cesniks set forth any of the elements of these separate causes of action or the facts

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[6] *See, e.g., Fikes v. City of Daphne*, 79 F.3d 1079, 1082-83 (11th Cir. 1996); *Beckwith v. City of Daytona Beach Shores*, 58 F.3d 1554, 1567 (11th Cir. 1995); *Pelletier v. Zweifel*, 921 F.2d 1465, 1517-18 (11th Cir.), *cert. denied*, 502 U.S. 855, 112 S. Ct. 167, 116 L. Ed. 2d 131 (1991); *T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1543-44 n.14 (11th Cir. 1985) (Tjoflat, J., dissenting).

underpinning them. Rather, a reader of the pleading must discern these things for himself.

Count two is labeled "Breach of Contract." The count alleges that in 1989 and again in 1991 the Cesniks and New Beginnings entered into a contract for the placement of a healthy baby. Count two does not, however, indicate whether the contract was reduced to writing, nor does it recite the provision(s) of the contract that New Beginnings breached.[7] All that is alleged is that "the defendants breached their contractual agreement with the plaintiffs for the placement and adoption of the plaintiffs' sons Caleb and Eli."

Count two also presents a claim for fraud with the following allegation: "The defendants fraudulently took monies for the placement of the plaintiffs' sons Caleb and Eli which were not earned, were for services not provided, were for expenses not incurred, and/or were not paid to the parties for whom the Cesniks were billed." In addition, of course, by incorporating all of the allegations of count one, count two alleges all of the other tort claims alleged in count one.

Count three is labeled "Federal and State Conspiracy." As we explain below, count three may be alleging five discrete causes of action: three federal claims and two state claims. Count three alleges the following (with respect to both the Cesniks' federal and state claims):

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[7] Count two seeks to hold the individual defendants, as well as the church, liable for breaching a contract as to which the individual defendants are not parties.

> All defendants . . . came to a mutual understanding to try to accomplish a common and unlawful plan, namely to engage in a "pattern of racketeering activity."
>
> . . .
>
> At the time the defendants knowingly and willingly agreed to join such a conspiracy, they did so with the specific intent to participate in at least two (2) of the predicate mail fraud and wire fraud offenses.
>
> Defendants knowingly and wilfully used the mails for communication and telephones for conversations in Interstate Commerce or caused to be transmitted by mail or wire in Interstate Commerce communications for the purpose of executing their scheme to defraud. 18 U.S.C. § 1341 and 1343.
>
> Said conspiracy is actionable under 18 U.S.C. § 1962 *et seq.* and O.C.G.A. § 16-4-1 *et seq.*

Under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1994) (as added by the Organized Crime Control Act of 1970, Pub.L. No. 91-452, § 901(a), 84 Stat. 922, 941-48), it is illegal for persons to

> engage in, or aid and abet another to engage in, a pattern of racketeering activity if they also do the following: invest income derived from the pattern of racketeering activity in the operation of an enterprise engaged in interstate commerce (section 1962(a)); acquire or maintain, through the pattern of racketeering activity, any interest in or control over such an enterprise (section 1962(b)); or conduct, or participate in the conduct of, the affairs of such an enterprise through

> a pattern of racketeering activity (section 1962(c)). Section 1962(d) makes it a crime to conspire to violate sections 1962(a), (b), or (c).

Pelletier v. Zweifel, 921 F.2d 1465, 1495-96 (11th Cir.), *cert. denied*, 502 U.S. 855, 112 S. Ct. 167, 116 L. Ed. 2d 131 (1991).[8] RICO provides a civil remedy for the victims of these section 1962 crimes, as follows: "Any person injured in his business or property by reason of a violation of [18 U.S.C. § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c).[9]

Count three alleges that the defendants were engaged in a "conspiracy," presumably in violation of 18 U.S.C. § 1962(d). To state a claim for damages suffered by reason of a violation of section 1962(d), a plaintiff must allege that the defendants conspired to violate one of the substantive provisions of 18 U.S.C. § 1962(a)-(c). The complaint nowhere indicates, however, which crime the

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[8] An act of "racketeering," commonly called a predicate act, is defined to include "any act which is indictable under . . . [18 U.S.C. §] 1341 (relating to mail fraud), [and 18 U.S.C. §] 1343 (relating to wire fraud)." 18 U.S.C. § 1961(1)(B). The elements of mail and wire fraud are identical. "Mail or wire fraud occurs when a person (1) intentionally participates in a scheme to defraud another of money or property and (2) uses the mails or wires in furtherance of that scheme." *Pelletier*, 921 F.2d at 1498.

[9] Count three makes no reference to 18 U.S.C. § 1964(c). We treat the Cesniks' allegation that the conspiracy is "actionable under 18 U.S.C. § 1962 *et seq.*" as stating a claim for relief under section 1964(c).

defendants allegedly conspired to commit. We are left to speculate whether the Cesniks seek to state a claim for damages by reason of a conspiracy to violate section 1962(a) or (b) or (c).[10] Finally, to state a RICO claim a plaintiff must describe the "enterprise" involved in the defendant's scheme, for without an enterprise there can be no RICO violation. *See* 18 U.S.C. § 1962(a)-(c). The word "enterprise" appears nowhere in the complaint.[11]

Count three also possibly asserts two claims for relief under the Georgia RICO (Racketeer Influenced and Corrupt Organizations) Act, O.C.G.A. §§ 16-14-1 to 16-14-15 (1992 & Supp. 1995). Those claims are described in the margin;[12] they suffer the same infirmities as their federal counterparts.

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[10] In their brief to the district court in opposition to the appellees' joint motion for summary judgment, the Cesniks did not inform the court which sections the appellees allegedly conspired to violate.

[11] Nor does the word "enterprise" appear in the Cesniks' brief in opposition to the appellees' joint motion for summary judgment. In the section of the Cesniks' appellate brief concerning federal RICO, the word "enterprise" appears only in a quotation from section 1962.

[12] There are two substantive criminal provisions in the Georgia RICO statute:

> (a) It is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money.
>
> (b) It is unlawful for any person employed by or associated with any enterprise to conduct or

Despite the fact that the Cesniks' complaint, especially count three, is so disorganized, the appellees did not move the district court to require the Cesniks to file a more definite statement. *See* Fed. R. Civ. Proc. 12(e). Nor did the court require one.[13] Instead, the appellees opted to file an answer. They admitted that the adoptions took place, but denied liability under any of the appellants' theories of recovery. The appellees also plead several affirmative defenses, including that the complaint failed to state a claim for relief and that the statute of limitations barred the Cesniks' claims.

Following extensive discovery, the district court granted the appellees' motion for summary judgment as to all of the Cesniks' claims for relief. The court read the Cesniks' complaint as having presented several tort claims, a claim for breach of contract, and claims "under the federal and state conspiracy statutes." The court referred to the Cesniks' common-law tort claims as claims

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participate in, directly or indirectly, such enterprise through a pattern of racketeering activity.

O.C.G.A. § 16-14-4. Like 18 U.S.C. § 1962(d), O.C.G.A. § 16-14-4(c) makes it illegal "to conspire or endeavor to violate any of the provisions of subsection (a) or (b) of [O.C.G.A. § 16-14-4]."

O.C.G.A. § 16-14-6(c) provides a victim of these crimes a civil remedy in much the same fashion as does 18 U.S.C. § 1964(c). We treat the allegation in the Cesniks' complaint that the alleged conspiracy is "actionable under . . . O.C.G.A. § 16-14-1 *et seq.*" as stating a claim for relief under section 16-14-6(c).

[13] The court clearly had the discretion to strike, on its own initiative, the Cesniks' complaint, and to require the Cesniks to file a more definite statement. *See Anderson*, 77 F.3d at 367 n.5.

for "personal injury, mental and physical," claims under the "remaining theories under the tort of wrongful adoption and placement,"[14] and a "claim for fraud."

The district court concluded that the Cesniks' common-law tort claims were barred by the applicable two-year statute of limitations. It concluded that the Cesniks' contract claim was foreclosed because they "could have avoided" the injury they allegedly sustained

> by the use of reasonable effort after they learned of the mental and physical conditions of the children because under the terms of the placement agreement the Plaintiffs could simply have ended the adoption proceedings and could have returned the children to the Agency.

Finally, the court found no merit in the Cesniks' federal and state RICO claims because the record contained no evidence of a conspiracy to defraud the Cesniks or the predicate acts of mail or wire fraud. The court said nothing regarding the Cesniks' failure to describe the enterprise allegedly involved in the appellees' conspiracy; nor did it indicate which substantive provision of 18 U.S.C. § 1962 the appellees were supposed to have conspired to violate. In short, the court did not consider whether count three of the complaint stated a claim for relief.

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[14] In referring to the "remaining theories under the tort of wrongful adoption and placement," we assume that the court was referring to some or all of the tort theories described in count one (labeled "wrongful placement and adoption" by the appellants), which we quote in the text *supra*.

III.

We are satisfied that the statute of limitations bars whatever tort claims the Cesniks may have had under Georgia common law. Accordingly, we affirm the district court's summary disposition of those claims. As for the Cesniks' remaining claims – the claim for breach of contract and the claims under the federal and Georgia RICO statutes – with a few exceptions, we are unable, on the state of the record before us, to sustain the court's judgment. We first consider the common-law tort claims.

A.

Although the district court did not identify all of the Cesniks' common-law tort claims – it referred to many of them as the "remaining theories under the tort of wrongful adoption and placement,"[15] – it concluded that all of them were barred by the two-year statute of limitations because all of the alleged tortious acts occurred (at the latest) prior to September 26, 1991 (the date of Eli's adoption), and the suit was not filed until December 12, 1993. *See* O.C.G.A. §§ 9-3-33, 9-3-96 (1982).[16] The Cesniks

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[15] Neither the Cesniks nor the district court cited any authority for the proposition that Georgia recognizes a tort of "wrongful adoption and placement," and we have found none.

[16] O.C.G.A. § 9-3-96 provides that "[i]f the defendant . . . [is] guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud." The Cesniks did not discover the fraud associated with the placements of Caleb and Eli until the boys' medical records were sent to them by mail. Thus, in the case of Caleb, the period of limitations began running in May of 1990; in the case of Eli, in April of 1991.

argue, however, that the running of the period of limitations was tolled when Phoebe Dawson made her threat at the Cesniks' home on July 21, 1991. The Cesniks claim that after that date they were unable to take any sort of legal action against the appellees out of fear that the agency might take reprisals – either by withholding the agency's consent to the adoption of Eli,[17] or by making it difficult for the Cesniks to receive an adoption subsidy from the state of Georgia. This fear supposedly persisted from the time of the threat until May 18, 1993, when the Georgia Department of Human Resources notified the Cesniks that they would receive an adoption subsidy. The Cesniks argue that the running of the period of limitations was tolled during the twenty-seven months that they were under the duress caused by Dawson's threat, and that therefore their claim was filed within the limitations period.[18] We do not agree.

The record shows that shortly after the Cesniks began making efforts to get a state adoption subsidy, Phoebe Dawson flew to Minnesota and met the Cesniks in their home. Dawson asked to hold Eli, and, once the

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[17] Caleb's adoption had been final for a year before July 21, 1991, the day that Dawson made her threat. Eli's adoption, however, was not final until September 26, 1991.

[18] The Cesniks claim that the statute ran for 21 months in the case of Caleb (from May of 1990, when the fraud was discovered, to July 21, 1991, when Dawson made her threat, and again from May of 1993, when the adoption subsidy was approved, to December 9, 1993, when the claim was filed in district court), and for 9 1/2 months in the case of Eli (from April of 1991, when the fraud was discovered, to July 21, 1991, and again, as with Caleb, from May of 1993, to December 9, 1993). The period of limitations is 24 months.

child was in her arms, she is alleged to have stated something to this effect: "This child is in my custody. I can withhold [our] consent to adopt if there is any more discussion of [Eli] being handicapped or drug exposed [or if you do] not keep quiet about what ha[s] happened." Dawson then handed Eli back and left the home. Dawson and the Cesniks had no further contact.

The Cesniks claim that this threat put them in fear of losing Eli if they took any action against the agency. But this fear could have been reasonable only until August 8, 1991 (eighteen days after the threat), when New Beginnings gave its consent to Eli's adoption. The Cesniks claim that after Eli's adoption they feared that the agency might block their attempts to receive an adoption subsidy for both Caleb and Eli from the state of Georgia. But Dawson made no such threat, and it is not clear that Dawson or New Beginnings had any influence in this matter whatsoever. Moreover, the fear of retaliation by New Beginnings was evidently not so great as to keep the Cesniks from filing an administrative complaint against the adoption agency in August of 1992.[19] In sum, we find that there was no reasonable basis for a claim of duress after August 8, 1991, which was more than two years prior to the filing of the lawsuit.[20] The district court was

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[19] The Cesniks also offer no explanation for why they waited another seven months after the approval of the adoption subsidy to sue the agency.

[20] We do not mean to suggest that a reasonable claim of duress would necessarily have tolled the running of the statute of limitations in this case. Duress is not one of the enumerated conditions that tolls the statute of limitations under Georgia law. *See* O.C.G.A. §§ 9-3-90 to 9-3-97.1 (1982 & Supp. 1995).

thus correct in deciding that the statute of limitations barred the appellants' common-law tort claims.

B.

The district court rejected the Cesniks' contract claim on the ground that they could have mitigated their damages in full by returning the children to New Beginnings, as provided in the placement agreement. The problem with this holding is that neither the complaint nor the court describes the placement agreement. We will assume for sake of argument, however, that New Beginnings breached the placement agreement when it misrepresented the condition of the boys' health. We further assume that upon the agency's breach the Cesniks could have cancelled the agreement with New Beginnings and

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Moreover, we find no authority for the proposition that duress, as a matter of Georgia common law or equity, can toll the statute of limitations for a cause of action that is not itself based on a claim of duress. Indeed, what little authority we have found on the subject suggests that such a proposition could be maintained in very few states. *See Cooper v. Fidelity-Phila. Trust Co.*, 201 F. Supp. 168, 170 (E.D.Pa.1962) ("There is little authority for the proposition that 'duress' tolls the running of the statute of limitation."); *Baratta v. Kozlowski*, 464 N.Y.S.2d 803, 807 (App. Div. 1983) ("[R]eluctance [of courts] to recognize duress as a toll [may lie] in the undesirability of a rule that turns on the reasonableness of reliance upon threats of physical or economic harm, the ease of fabrication of such threats, or simply in the judicial reluctance to create an entirely new defense to the [s]tatute of [l]imitations.") (citations omitted); *see also* Annotation, *Duress or Undue Influence as Tolling or Suspending Statute of Limitations*, 121 A.L.R. 1294 (1939); 51 Am. Jur. 2d. *Limitation of Actions* § 177 (1970); 54 C.J.S. *Limitations of Actions* § 92 (1987).

returned the children to the agency. The question then becomes whether the Cesniks were required to do so, or else suffer the consequences.

The situation is analogous to a seller misrepresenting the quality of goods being sold to a buyer. Ordinarily, a buyer of goods that are not of the quality represented has two options. He can rescind the transaction by returning the goods to the seller and demanding a return of the purchase price, or he can stand on the transaction and sue for damages – measured by the difference in value between the goods as represented and the goods as received. Here, the Cesniks kept the children and seek to recover the expenses they will incur in excess of those they would have incurred had the children not been disabled.

The district court held, in effect, that the Cesniks did not have the option of standing on the contract and suing for damages. Rather, according to the court, the Cesniks had but one remedy: rescission. The court cited no authority for its holding and the appellees have likewise cited none; nor can we find any.[21] Under the circumstances, we cannot sustain the court's summary rejection

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[21] The appellees have cited statutes and cases that stand for the proposition that, under the law of Georgia, a claimant has a duty to mitigate his damages. This proposition, which is well founded in the common law, speaks to the issue of damages; it does not address the question whether the claimant can state a cause of action for breach of contract. Assuming that, on remand, the Cesniks can state a claim for breach of contract, the extent to which they may have failed to mitigate their damages will be a question to be resolved in litigating the issue of damages.

of the Cesniks' claim for breach of contract against the Edgewood Baptist Church. Because there is nothing in the record, however, that indicates that appellees Dawson, Merritt, and Winton were parties to the Cesniks' contract with the church, we affirm the district court's disposition of the breach of contract claim brought against them individually.

C.

As we have pointed out, the pleading of the Cesniks' federal and state RICO claims, in count three of their complaint, is woefully deficient. Count three does not cite the crimes (under 18 U.S.C. § 1962 and O.C.G.A. § 16-14-4) that the defendants allegedly conspired to commit. Nor does the pleading describe the "enterprise" involved in the conspiracy.[22] If ever there was a need for a more definite statement, it was with respect to count three.

The district court did not reject these claims because they were inadequately plead, however. Rather, the court concluded that the Cesniks could not make out a federal

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[22] The appellees did not base their joint motion for summary judgment on this deficiency, however, and the district court did not cite it as a ground for granting summary judgment. We therefore do not consider whether we should exercise our authority to affirm a district court's judgment dismissing a case on a ground not relied upon by the district court – in this instance, on the ground that the appellants failed to articulate an indispensable element of a federal or state RICO claim.

or state RICO claim because they had presented no evidence of (1) a conspiracy or (2) predicate acts of mail or wire fraud. We are convinced that, with the exception of appellee Winton, the court erred on these two points.

With respect to the first point, a reasonable jury could find from the evidence in the record that defendant Dawson misrepresented the boys' health for the purpose of inducing the Cesniks to accept them for adoption, that appellee Merritt participated in or was aware of the scheme,[23] and that their conduct implicated the church.[24] As for the second point, the facts we have recited, in part II *supra*, establish (for purposes of summary judgment) a scheme to defraud and several uses of the mails and wires in furtherance of that scheme.[25]

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[23] In contrast, the appellants have pointed to no evidence in the record, and we find none, sufficient to permit a reasonable jury to find that appellee Winton either participated in or was aware of the alleged conspiracy among Dawson, Merritt, and the church to defraud the Cesniks. (Winton did not become a employee of New Beginnings until after Caleb's placement; she is alleged to have participated in Dawson's scheme only with respect to Eli.) We thus affirm the district court's granting of summary judgment in favor of Winton.

[24] We express no view as to whether, under 18 U.S.C. § 1962(d), a corporation can be held to have conspired with one of its employees.

[25] The statute of limitations for a RICO claim is four years under the federal statute, *see Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156, 107 S. Ct. 2759, 2767, 97 L. Ed. 2d 121 (1987), and five years under Georgia RICO, *see* O.C.G.A. § 16-14-8. The record discloses uses of the mail and the telephone within four years of the filing of this law suit.

IV.

In conclusion, we affirm the district court's judgment dismissing count one of the appellants' complaint. As to count two, we affirm the court's judgment in favor of appellees Dawson, Merritt, and Winton, but vacate its judgment in favor of the church and remand for further proceedings. With respect to count three, we affirm the court's judgment in favor of appellee Winton, but vacate its judgment in favor of the remaining appellees. As to these appellees, count three is remanded for further proceedings.

Because the allegations of counts two and three are so muddled, we instruct the district court, before proceeding further in this case, to require the appellants to replead counts two and three of their complaint. With respect to count two, the appellants shall allege only a breach of contract – assuming that they wish to pursue such a claim. If the contract on which their claim is based is in writing, the appellants shall either attach the writing to the complaint, or recite the provision(s) of the contract that they contend give rise to their action for breach.

In repleading count three, the appellants shall state only one claim for relief. If they wish to state a claim under the federal RICO statute, they shall indicate the statutory provision(s) giving rise to such claim and shall also describe the enterprise involved in the RICO violation. If the appellants wish to state a claim under the Georgia RICO statute, they shall do so in a new count.

More need not be said.

SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

BLANE AND KRISTI CESNIK, Plaintiffs	*	CIVIL ACTION NO. 93-141-COL
vs.	*	
EDGEWOOD BAPTIST CHURCH d/b/a NEW BEGINNINGS ADOPTION AND COUNSELING AGENCY, et al., Defendants	*	

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Jan. 9, 1995)

New Beginnings Adoption and Counseling Agency, hereinafter the "Agency," named as a Defendant in this case, is a ministry of the Edgewood Baptist Church in Columbus, Georgia.[1] The Plaintiffs are citizens of the State of Minnesota. On December 9, 1989, pursuant to application by the Plaintiffs, the Agency placed a child with the Plaintiffs for adoption. On July 10, 1990, the Plaintiffs consummated the adoption of the child, and soon thereafter made application to the Agency for the placement of another child for adoption. On April 6, 1991,

[1] The individuals named as Defendants are alleged to have been associated or connected in some way with the activities of the Agency.

the agency placed a second child with the Plaintiffs for adoption. The Plaintiffs consummated the adoption of this second child on September 26, 1991. The Plaintiffs filed this lawsuit on December 12, 1993, seeking to recover damages for their alleged emotional injuries as well as for future medical expenses related to the care of these two children. In their complaint they allege the tort of wrongful placement and adoption, breach of contract, fraud, and federal and state conspiracy.

The Defendants have filed a motion for summary judgment and a brief and supplementary matter in support of the motion, and the Plaintiffs have filed a brief and supplementary matter in opposition to the motion. The Court has reviewed the contents of this file, including the discovery material, and has given careful consideration to the briefs submitted, and observes that, although there is disagreement concerning some peripheral matters, there is no conflict concerning the facts material to an adjudication of this matter, and has concluded that the Defendants' motion for summary judgment should be sustained for the reasons asserted in the motion and as elaborated upon in the cogent brief filed by counsel for the Defendants in support of the motion, which reasons are summarized as follows:

First, as to the Plaintiffs' claims for personal injury, mental and physical, these claims are barred by the applicable two year statute of limitations because all the actions occurred prior to September 26, 1991, and this lawsuit was not filed until December 12, 1993;

Second, as to the Plaintiffs' remaining theories under the tort of wrongful adoption and placement, recovery would be barred by the two year statute of limitations;

Third, even if the Plaintiffs' claims immediately above referred to were not deemed to be barred by the statute of limitations, Plaintiffs' theories of recovery for wrongful adoption and breach of contract cannot be the basis for recovery of any extraordinary expenses associated with the rearing of the two children because it is clear that the Plaintiffs could have avoided those expenses by the use of reasonable effort after they learned of the mental and physical conditions of the children because under the terms of the placement agreement the Plaintiffs could simply have ended the adoption proceedings and could have returned the children to the Agency;

Fourth, the Plaintiffs' claims for fraud must fail because the Plaintiffs had full knowledge of the fact that each of the two children were not healthy prior to their consummation of the adoptions and therefore they did not justifiably rely on any alleged misrepresentations made by the Defendants; and

Fifth, the Plaintiffs are precluded as a matter of law from any recovery under the federal and state conspiracy statutes because there is no evidence that the Defendants conspired to defraud the Plaintiffs and because the Plaintiffs cannot establish that the Defendants committed mail or wire fraud.

Consistent with the foregoing, Defendants' motion is sustained and an appropriate judgment will be entered.

IT IS SO ORDERED, this 9th day of January, 1995.

/s/ J. Robert Elliot
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-8151

BLANE CESNIK,
KRISTI CESNIK,

Plaintiffs-Appellants,

versus

EDGEWOOD BAPTIST CHURCH, d/b/a
New Begginnings [sic] Adoption and
Counseling Agency, et al.,

Defendants-Appellees.

On Appeal from the United States District
Court for the Middle District of Georgia

(Filed Aug. 20, 1996)

BEFORE: TJOFLAT, Chief Judge, CARNES, Circuit Judge and FAY, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellees, Edgewood Baptist Church, et al., is denied.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
UNITED STATES CIRCUIT JUDGE